IN THE

Supreme Court of the United States

October Term, 1977

No. 77-678

ATLANTIC SHIPPING, INC.
CIE CHAMBON MACLOVIA S.A.,

Petitioner,

v.

STEPHEN EDYNAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner Atlantic Shipping, Inc. Cie Chambon Maclovia, S.A. (hereinafter referred to as "Atlantic") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the matter of *Stephen Edynak v. Atlantic Shipping, Inc. Cie Chambon Maclovia S.A. v. Allied Chemical Company,* C. A. No. 76-2293.

OPINIONS BELOW.

The opinion of the Court of Appeals below is reproduced in Appendix A; the memorandum opinion of the District Court below is reproduced in Appendix B. Neither opinion has yet been published.

JURISDICTION.

The judgment of the Court of Appeals, reproduced in Appendix C, was dated and entered on August 15, 1977. Atlantic's petition for rehearing en banc was denied by the Court of Appeals in an order dated September 23, 1977; the order on rehearing is reproduced in Appendix D. In an order dated October 20, 1977, the Court of Appeals granted Atlantic's motion for Recall and Stay of Mandate until November 20, 1977 upon condition that Atlantic file a petition for writ of certiorari with the Supreme Court during the period of said stay, and that Atlantic resubmit to the District Court for its approval and file a good and sufficient supersedeas bond in the amount of $350,000 on or before October 25, 1977; the order on the Motion for Recall and Stay of Mandate is reproduced in Appendix E. In an order dated and filed on October 21, 1977, the District Court vacated its earlier disapproval of a supersedeas bond in the amount of $350,000 and approved that bond in light of the order of the Court of Appeals granting the Motion for Recall and Stay of Mandate; the order sur supersedeas bond is reproduced in Appendix F.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS FOR REVIEW.

Does the shipboard presence of the cargo-owner's injured crane signalman mandate the application of federal maritime law, rather than state tort law, to determine his rights and the ship owner's liability for an accident caused by the unique operation of a land-based crane owned and operated exclusively by the signalman's employer, the cargo-owner, during its unloading of its cargo from the ship?

May a finding of unseaworthiness be based upon a method of operating a land-based crane where that method had not endangered the crane signalman, plaintiff below, and where the plaintiff's injuries were caused solely by the unique, isolated, and unprecedented movement of the crane bucket by plaintiff's fellow employee without a signal?

In the course of its charge to the jury on the question of the unseaworthiness of a ship may a trial court instruct the jury that a land-based crane not owned or operated by the ship owner and unconnected to the ship is deemed to be an appurtenance of the ship?

May a verdict on damages be permitted to stand where the trial court notes that the award was generous and simply defers to the jury, and where the Court of Appeals notes that $273,500 of the $300,000 verdict was for loss of earning capacity and for pain and suffering, that there was little evidence to establish any significant loss of earning capacity, that the award was quite high, and that, had it been the district court, it might have found the award excessive and granted a new trial?

STATEMENT OF THE CASE.

Jurisdiction of the District Court Below Was Based on 28 U. S. C. § 1332.

Stephen Edynak, plaintiff below, is a laborer employed by Allied Chemical Company ("Allied"). On December 10, 1971, as he had done on three or four occasions in the preceding seven months of his twelve year tenure with Allied, Edynak acted as the signalman, the remote "eyes" of Allied's pier-based crane, during Allied's unloading of its cargo of fluorspar from one of Atlantic's ships. The crane was physically situated on the pier resting upon rails thirty to forty feet inshore of the ship, and was exclusively owned, operated, and maintained by Edynak's employer, Allied. The crane was completely unattached to the ship, and the crane operator was Edynak's fellow employee. On five or six occasions during the two work days that the crane was engaged in Allied's unloading operations, the crane bucket contacted the coaming, the chest-high metallic wall surrounding the 30′ x 60′ rectangular hatch opening, while being operated near the edge of the hatch. These movements, however, were always in response to a signal from Edynak, and never created any danger to him. On one occasion, however, during the afternoon of December 10, 1971, when the crane bucket had been suspended for some ten minutes twenty feet above the far corner of the hatch and as Edynak stood with his left hand on the coaming, the crane bucket suddenly swung about and descended. This particular, unprecedented movement was made without a signal from Edynak, and resulted in an injury to his left hand. After the accident, Edynak was taken to a hospital where surgical procedures to repair his left hand were initiated, beginning with a skin graft. Several additional

hospitalizations and surgical procedures restored his hand function to the point where a good plateau of recovery was realized and he could once again use it to pick up objects, open his car door, and for many other functions. His hand, however, was not completely restored and remained disfigured. Although his doctor opined that he had lost seventy-five per cent of the use of his hand, Edynak continued to work as a laborer for Allied. Medical expenses of $12,746.90 and wage losses totalling $13,669.19 were attributed to this accident. Those items, totalling $26,416.09, were paid for by Allied's compensation benefits to Edynak. There was no evidence of future wage losses or medical expenses.

In due course, Edynak began to be paid compensation benefits by Allied, and he brought this action against Atlantic, claiming that the unseaworthy condition of its ship caused the accident. Atlantic joined Allied as a third-party defendant for indemnity. Since Edynak's unseaworthiness claim was based upon the alleged improper operation of Allied's crane by Edynak's co-worker, Allied assumed Atlantic's defense before trial. Trial resulted in a verdict of $300,000 in favor of Edynak against Atlantic; the verdict was molded into a $285,000 judgment, to reflect the jury's finding that Edynak was contributorily negligent.

In its post-trial motions and in its subsequent appeal, Atlantic contended that federal maritime law should not have been applied to this case; that, if the doctrine of unseaworthiness were to be applied, the accident was not caused by an unseaworthy condition of the ship but by an isolated, personal act of negligence on the part of Edynak's fellow employee, and the crane was not, as the trial judge had instructed the jury, an appurtenance of the ship; and that the award of damages was excessive. The Court of Appeals held that the application of federal maritime law

was mandated because Edynak had been engaged in unloading the ship and was aboard the vessel when injured; that a finding of unseaworthy condition could be predicated upon the evidence of the prior contacts between the coaming and the crane bucket, and the District Court's treatment of the crane as an appurtenance was harmless error; and that, although the award of damages was quite high, and had the Court of Appeals been the trial court it might perhaps have found the verdict excessive and granted a new trial, it could not hold that the District Court's denial of the motion for a new trial was a manifest abuse of discretion.

REASONS FOR GRANTING THE WRIT.

In *Victory Carriers, Inc. v. Law,* 404 U. S. 202, 92 S. Ct. 418 (1971), and in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U. S. 249, 93 S. Ct. 493 (1972), this Honorable Court delineated the scope of federal admiralty jurisdiction, holding, in *Victory Carriers,* that federal maritime law did not apply even though the injured plaintiff was a longshoreman engaged in loading a ship for a stevedore hired by the shipowner, and in *Executive Jet,* that federal maritime law did not control although the accident culminated in navigable waters. In *Snydor v. Villain & Fassio et Compania Int. DiGenova,* 459 F. 2d 365, 367 (4 Cir. 1972), the Court of Appeals for the Fourth Circuit observed that this Honorable Court in *Victory Carriers* "pointed out that the mere fact that a longshoreman was engaged in loading or unloading a vessel at the time of his injury did not necessarily bring him within the ambit of the [Admiralty Extension] Act, but that *recovery in admiralty is limited to those situations where the injuries are caused by the ship, its crew or its appurtenances*" (emphasis added). Regarding the decision ir *Executive Jet,* Professor Moore stated, "The opinion clearly seems to put to rest the idea that *locality alone* can ever provide the basis for admiralty jurisdiction unless specifically provided by Congress . . . and, while this author would have preferred that the Court scrap locality as being even a relevant ingredient for determining whether admiralty jurisdiction exists, it seems eminently clear that the Supreme Court used a locality-plus test for maritime tort jurisdiction, and did not seem to think that this test applied only to aviation cases", 1974 Cumulative Supplement to Volume 7A, Moore's Federal Practice and Procedure, at 111-112 (emphasis in original); *accord,* G. Gilmore & C. Black, The Law of Admiralty § 1-10 at 31 n. 98d (2d ed. 1975).

Whether plaintiff's status in assisting his non-stevedore employer to unload its cargo from another's ship and his position aboard ship when injured together mandate the application of federal maritime law, as the Court of Appeals below held, was a question not yet decided directly by this Honorable Court. The decision reached by the Court of Appeals below, however, is in conflict with the letter and the spirit of the decisions reached by this Court in *Victory Carriers* and *Executive Jet,* and it is at odds with the interpretations given to those decisions by the Fourth Circuit in *Snydor* and by the learned commentators cited above. As this Honorable Court recognized in *Victory Carriers, supra,* 404 U. S. at 215, 92 S. Ct. at 426-427, "Recovery without proving negligence is not the issue here; nor is it the equities of the injured longshoreman's position as against those of the shipowner who has had and exercises no control whatsoever over the use of the stevedore's equipment on the dock. What is at issue is the amount of the recovery, not against a shipowner, but against the stevedore employer. As this case illustrates, the shipowner's liability for unseaworthiness would merely be shifted, with attendant transaction costs, to the stevedore by way of a third-party action for indemnity."

Having held that federal maritime law was properly applied in this case, where Edynak's unseaworthiness claim against Atlantic was predicated upon an alleged improper method of operation of Allied's shoreside crane by Allied's crane operator, the Court of Appeals paved the way for Allied's paying an award far in excess of its compensation obligation to its employee. That result, otherwise unobtainable directly by Edynak, became a definite reality when the Court of Appeals resolved the questions of unseaworthy condition, appurtenance, and damages in Edynak's favor.

In the beginning of its opinion, the Court of Appeals below acknowledged that Edynak was injured when "without signal or warning, the crane bucket swung about, descended and struck Edynak's left hand" and that "that crane operator had not previously lowered the bucket without a signal", Appendix A at A4. In *Usner v. Luckenbach Overseas Corp.*, 400 U. S. 494, 91 S. Ct. 514 (1971), a case with much closer maritime ties than this case,[1] the plaintiff was involved in unloading a ship when "upon one occasion the winch operator did not lower the fall [running from the ship's boom] far enough. Finding the sling [attached to the fall] beyond his reach, [plaintiff] motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall further. The winch operator then lowered the fall but he lowered it too far and too fast. The sling struck the [plaintiff], knocking him to the deck of the barge and causing his injuries. Neither before nor after this occurrence was any difficulty experienced with the winch, boom, fall, sling or any other equipment or appurtenance of the ship or her cargo", 400 U. S. at 495, 91 S. Ct. at 515. Affirming the judgment of the Court of Appeals on this question that went to the very definition of what unseaworthiness is and what it is not, this Honorable Court held, "What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly

1. Plaintiff in *Usner* was a longshoreman who was breaking out bundles of cargo aboard a barge, and who was struck by an instrumentality directly connected with an appurtenance of the ship.

emphasized in our decisions. In *Trawler Racer,* [362 U. S. 539, 80 S. Ct. 926], there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence", 400 U. S. at 500, 91 S. Ct. at 518.

The decision of the Court of Appeals below runs counter to the decision of this Honorable Court in *Usner,* to the decision of the ninth circuit in *Ryan v. Pacific Coast Shipping Co.,* 509 F. 2d 1054 (9 Cir. 1975), and to the facts of this case. The alleged improper method of operation found by the Court of Appeals below to have rendered the ship unseaworthy was the crane operator's lowering the bucket by the "freefall" method and his sinking the coaming on a few occasions while working near it. It is clear, however, that the only cause of the accident in this case was the crane operator's individual act of negligence in moving and lowering the bucket without a signal and with Edynak in a position of danger, not the freefall method or the prior strikes against the coaming. The prior strikes were comparatively rare; they occurred only when the large bucket was being operated near the coaming; and they occurred in response to a signal from Edynak but never threatened any harm to him, being some three to four feet away from the coaming when they happened. Only on this one occasion did the crane operator move the bucket without a signal and with Edynak in a position of danger. That act clearly was no more than an isolated, personal act of negligence on the part of a third person, and should not have been held to have created an unseaworthy condition on the vessel.

In instructing the jury about the law applicable to the question of unseaworthiness, the District Court charged the jury that the pier-based crane was an appurtenance of the vessel, and that all that must be proved is that the equipment involved, and in this case the method of operation of the equipment involved, was not reasonably fit for its intended purpose and that plaintiff was injured as a direct result of that. Citing *Victory Carriers, supra,* and *Burns v. Anchor-Wate Co.,* 469 F. 2d 730 (5 Cir. 1972), the Court of Appeals below held that this instruction "would appear to be inaccurate", but was "harmless because the focus of Edynak's case was on the method of unloading, and not on the fitness of the crane", Appendix A, n. 15 at A18. Because the applicability of maritime law requires an intimate nexus between the accident and the ship; because that connection could only be established in this case by regarding Allied's pier-based crane as part of Atlantic's ship; and because the thrust of Edynak's case was not clear, this instruction, which equated the crane with the ship and which overlooked the isolated movement of the crane bucket without a signal was more than harmless error. It permitted Edynak and the jury to evade the scope of maritime law so carefully delineated by this Honorable Court and followed by the Fifth Circuit in *Ryan, supra.*

Finally, the result feared in *Victory Carriers* was created in this case when both the District Court and the Court of Appeals allowed the $300,000 damage award to stand. In response to Atlantic's contention that the award was excessive, the District Court, although it thought the award was generous, simply regarded the matter as something exclusively for the jury's assessment. The Court of Appeals refused to disturb the lower court's ruling, although it found the award to be quite high, although perceived that approximately $273,500 of the award was only

for pain and suffering, and although it stated that "Had we been the district judge, we might perhaps have found the verdict excessive and granted Atlantic's motion for a new trial", Appendix A at A21. With respect to the damages awarded to Edynak, a sum that would ultimately have to be paid by his employer if the decision of the Court of Appeals is left undisturbed, the decisions of the lower courts depart so far from a court's review of a damage verdict to let other lower courts take the position that it is up to the jury alone to determine the fair measure of an injured plaintiff's compensation. That determination is, of course, up to the jury in the first instance; but where, as here, the courts, who have the power and the duty to review those awards so that excessive verdicts may be avoided, completely abandon their function by virtually delegating their authority, an exercise of this Honorable Court's supervisory power is to be invoked.

Edynak will undoubtedly contend that this Honorable Court should not grant Atlantic's petition for writ of certiorari in this case because he thinks that the case has little precedential value because of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 ("LHWCA"). The amendments to the LHWCA, of course, do not apply to this case because they were passed and became effective after the date of the accident in question. Furthermore, it is questionable that the amendments would compel a different result in this case since Edynak is neither a longshoreman nor a harbor worker by trade, and it appears that the amendments do not completely foreclose the maritime warranty of seaworthiness in all cases. The Court of Appeals below regarded the case sufficiently important to entertain oral argument and to write a lengthy opinion. As to Allied and other employers who face an increased burden in excess of their compensation obligations to their employees

and beyond the protection afforded them by the compensation laws, this case is of great importance. If the decision of the Court of Appeals below is left undisturbed, a precedent will have been set to side-step the careful delineations drawn by this Honorable Court and to permit an employee to negate his employer's compensation immunities and protections by indirection. What was perceived as the central issue in *Victory Carriers* existed in this case; the resolution of that central issue by the Court of Appeals below is contrary to the sensitivities and approach of this Court. Atlantic and ultimately Allied are faced with responsibility for an accident caused by an operation of a land-based structure not owned or controlled by the shipowner and with no physical connection to the ship. This situation is quite similar to the situation in *Victory Carriers* where the cause of the accident could not be attributed to the ship, her crew, cargo, or appurtenances. What can be gleaned from *Victory Carriers* and from the 1972 amendments to the longshoremen's compensation act is a clear intent to avoid circumvention of an employer's compensation immunities and an enlargement of his financial obligations by way of a third-party action whose nature is fictional at best. If Edynak had been standing on the pier when he was struck by the crane bucket, he would have had no cause of action against the ship, see Appendix A, n. 9 at A9. Does his presence aboard ship so change the situation as to make the shipowner nominally liable for this accident? The treatment of this case by the Court of Appeals below has, in effect, rendered the situs of the injured party the paramount factor: if he is ashore, his remedy is limited to compensation; if he happens to be aboard a ship, his remedies are broadened and his employer's financial obligations are increased. The result reached by the Court of Appeals below is contrary to the spirit of the law as delineated by this Court in *Victory Carriers, Executive Jet,* and *Usner,* and that result should be reversed.

CONCLUSION.

For the foregoing reasons, Atlantic Shipping, Inc., whose defense has been assumed by its indemnitor, Edynak's employer, prays that its petition for a writ of certiorari be granted and that this Honorable Court review the decision of the United States Court of Appeals for the Third Circuit in the matter of *Stephen Edynak v. Atlantic Shipping, Inc. Cie Chambon Maclovia S.A.*, No. 76-2293.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2293

STEPHEN EDYNAK

v.

ATLANTIC SHIPPING INC.
CIE. CHAMBON MACLOVIA, S.A.
Appellant

v.

ALLIED CHEMICAL COMPANY

(D. C. Civil Action No. 73-2686)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 3, 1977

Before SEITZ, *Chief Judge*, ROSENN, *Circuit Judge*, and MEANOR,* *District Judge*.

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* H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

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Opinion of the Court.

(Filed August 15, 1977)

ROSENN, *Circuit Judge.*

When Congress enacted the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 and thereby abolished the longshoreman's suit for unseaworthiness,[1] it hoped to reduce the litigation arising from longshoremen's personal injuries and to effect a saving of judicial resources.[2] The experience of this court indicates that, for two reasons, Congress' hope has yet to be realized: first, the unclarity of the 1972 amendments has generated litigation seeking interpretation of that legislation;[3]

1. Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (codified at 33 U. S. C. § 905(b) (Supp. V. 1975)). *See generally* Hurst v. Triad Shipping Co., No. 76-1923 (3d Cir. Apr. 25, 1977) (sustaining constitutionality of congressional abolition of longshoreman's suit for unseaworthiness).

2. *See* H. R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5, *reprinted in* [1972] U. S. Code Cong. & Ad. News 4698, 4702-03; S. Rep. No. 92-1125, 92 Cong., 2d Sess. 9 (1972). The House Report specifically mentioned the impact of longshoremen's unseaworthiness actions on the caseload of the United States District Court for the Eastern District of Pennsylvania.

3. *See, e.g.*, Hurst v. Triad Shipping Co., *supra*, slip op. at 15; Maher Terminals, Inc. v. Farrell, 548 F. 2d 476 (3d Cir. 1977); Dravo Corp. v. Maxin, No. 75-2403 (3d Cir. Nov. 15, 1976), *cert. denied*, 45 U. S. L. W. 3840 (U. S. June 27, 1977); Sea-Land Serv.,

second, the unseaworthiness action remains available to those longshoremen who were injured prior to the enactment of the 1972 amendments.[4] The instant appeal is illustrative of the second reason, and presents several questions regarding the scope of the longshoreman's unseaworthiness action.

I.

On December 9 and 10, 1971, Stephen Edynak, an employee of Allied Chemical Company ("Allied"), was working on board the S. S. *Ariana*, a vessel owned by appellant Atlantic Shipping Company ("Atlantic"). Edynak was functioning as a signalman, using a series of hand signals to coordinate and direct the movements of a pier-based crane as it unloaded the *Ariana's* cargo of fluorspar; because of the crane operator's remote, shore-side location in the crane's control cab, a signalman was necessary to serve as the operator's "eyes." The crane was owned, operated, and maintained exclusively by Allied, and the cargo being unloaded was also owned by Allied.

During the afternoon of December 10, Edynak signaled the crane operator to relocate the crane from the *Ariana's* number four hatch forward to her number three hatch. When Edynak looked into the number three hatch opening, he observed men working below. He placed his hands on the hatch coaming—the metal, chest-high wall surrounding the hatch opening—and waited for them to finish. The crane's bucket was at that point hanging stationary above

3. (Cont'd.)
Inc. v. Director, 540 F. 2d 629 (3d Cir. 1976). The Supreme Court's decision in Northeast Marine Terminal Co. v. Caputo, 45 U. S. L. W. 4729 (U. S. June 17, 1977), has resolved many of the questions of statutory interpretation that had perplexed the courts of appeals.

4. Martinez v. Dixie Carriers, Inc., 529 F. 2d 457, 460 n. 1 (5th Cir. 1976); *see* Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U. S. 106, 107 n. 1 (1974).

a far corner of the hatch. Edynak continued to wait for five or six minutes, then turned his back to the crane and began to look out in the direction of the Delaware River. In making this movement, he gave no signal to the crane operator, and his left hand remained on the hatch coaming. A minute or two later, without signal or warning, the crane bucket swung about, descended, and struck Edynak's left hand. On the two days that Edynak had been aboard the *Ariana* the crane bucket had struck the coaming on five or six occasions, but the crane operator had not previously lowered the bucket without a signal.

A number of medical operations were necessary to restore partial use of Edynak's left hand. Following the accident, Edynak, who is right-handed, continued his employment with Allied at the prevailing laborer's rate, the rate he earned at the time of the accident. He lost some time from work while undergoing surgery and recuperating.

Edynak brought suit against Atlantic in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on diversity of citizenship. He claimed that Atlantic was negligent, that an improper method of unloading the *Ariana* rendered the vessel unseaworthy, and that Atlantic's negligence and the vessel's unseaworthiness proximately caused his injuries. Atlantic joined Allied as a third-party defendant. A jury returned a verdict in favor of Edynak at the end of the liability phase of a bifurcated trial. By answers to special interrogatories, the jury found that Atlantic was negligent, that the vessel was unseaworthy, and that Edynak's own negligence contributed to his injuries in the proportion of five percent. The jury subsequently assessed damages at $300,000. Judgment was entered in favor of Edynak against Atlantic in the amount of $285,000, reflecting a five percent reduction as a consequence of Edynak's contributory negligence,[5] and the third-party action against Allied was dismissed. The district court denied Atlantic's motion for judgment notwithstanding the verdict or for a new trial.

On this appeal, Atlantic argues that maritime law was inapplicable to this case; that even if maritime law was applicable, the vessel was not unseaworthy; and that the damages were excessive.[6] We affirm.

II.

Atlantic first contends that state law rather than federal maritime law should have been applied to this case. In support of this proposition, Atlantic relies primarily on two cases: *Victory Carriers, Inc. v. Law*, 404 U. S. 202 (1971), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U. S. 249 (1972).

In *Victory Carriers*, Law, a longshoreman, was injured on a pier while driving a forklift owned by and under the direction of his stevedore employer. Law had picked up a load of cargo on the dock and moved it to a point alongside the S. S. *Sagamore Hill* where it was to be lifted aboard by the vessel's own equipment. As he returned to the pickup point, the overhead protection rack of the forklift came loose and fell on him. He sued the vessel and its owner in federal district court, alleging that the unseaworthiness of the vessel and the negligence of its owner

5. Under maritime law, contributory negligence does not bar recovery. Rather, admiralty "allows such consideration of contributory negligence in mitigation of damages as justice requires." Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 409-10 (1953). *Accord*, Palmero v. Luckenbach S. S. Co., 355 U. S. 20, 21 (1958); Seas Shipping Co. v. Sieracki, 328 U. S. 85, 94 n. 11 (1946); The Max Morris, 137 U. S. 1 (1890).

6. Atlantic does not appear to contest the dismissal of the third-party action. Appellant's position on the finding of negligence is unclear, but because of our disposition of the unseaworthiness issue, *see* Parts II and III, *infra*, we need not consider the negligence finding in any event.

had caused his injuries. The unseaworthiness claim became the critical issue. The district court granted the vessel owner's motion for summary judgment on the ground that the doctrine of unseaworthiness did not extend to Law, but the United States Court of Appeals for the Fifth Circuit reversed.

The Supreme Court reversed the court of appeals. Mr. Justice White, writing for the majority, stated that the threshold question before the Court was "whether federal maritime law governs accidents suffered by a longshoreman who is injured on the dock by allegedly defective equipment owned and operated by his stevedore employers." 404 U. S. at 204. In answering that question in the negative, Justice White observed that Law's case exhibited none of the typical elements of a maritime cause of action:

> Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment that injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank.

Id. at 213-14. The Court held that state law, and not federal maritime law, governed Law's accident.

Atlantic argues that in the instant case, as in *Victory Carriers*, the typical elements of a maritime cause of action are particularly attenuated. Edynak was not injured by equipment that was part of the ship's usual gear or that was stored on board, nor was the equipment that injured him in any way attached to the ship, nor was the crane bucket under the control of the ship or its crew. The only element present in the instant case but lacking in *Victory Carriers* was the occurrence of the accident on board the ship. And, Atlantic submits, *Executive Jet Aviation, Inc.*

v. City of Cleveland establishes the insignificance of the maritime situs of Edynak's injury in invoking the coverage of federal maritime law.

Executive Jet Aviation involved the crash of a jet aircraft in the navigable waters of Lake Erie. As the jet was taking off from a lakefront airport owned by the City of Cleveland, it struck a flock of seagulls, lost power, crashed, and ultimately sank in the lake. The owners of the aircraft, relying on the locality of the accident to support federal admiralty jurisdiction, sued the city for damages in federal district court. That court dismissed the complaint, holding that the suit was not cognizable in admiralty, and the court of appeals affirmed.

The Supreme Court also affirmed. Mr. Justice Stewart, writing for a unanimous Court, concluded that "maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases." 409 U. S. at 261. In addition to meeting the locality test, he said, the wrong in such cases must bear a significant relationship to traditional maritime activity, *id.* at 268; the crash of a land-based aircraft embarking on a flight between points within the continental United States failed to meet this requirement. The language of Justice Stewart's opinion was strictly limited to accidents involving aircraft: "'In both death and injury cases . . . it is evident that while distinctions based on locality often are in fact quite relevant where water vessels are concerned, they entirely lose their significance where aircraft, which are not geographically restrained, are concerned.'" *Id.* at 266, quoting 7A J. Moore, Federal Practice ¶ .330[5], at 3772-73 (2d ed. 1972).

Even if *Executive Jet* be read to transcend aviation tort claims, and to establish a general admiralty tort rule that a connection to traditional maritime activity as well as maritime locality is necessary to invoke federal maritime

law,[7] we discern the requisite nexus in the instant case. We adopt the Fifth Circuit's criteria for determining whether torts occurring upon navigable waters have a maritime connection: the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and the type of injury, and the traditional concepts of the role of admiralty law. *Kelly v. Smith*, 485 F. 2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U. S. 969 (1974); *see* cases cited in 7A J. Moore, *supra*, ¶ .325[3] at 114 n. 73 (2d ed. Supp. 1976). All four criteria are satisfied in this case. Edynak played an indispensable role in the unloading of the ship—work which the Supreme Court has characterized as historically "the work of the ship's service." *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 96 (1946). The accident involved a ship, not an aircraft. Edynak's injury was allegedly the result of an improper method of unloading. And admiralty law has traditionally been concerned with the loading and unloading of vessels. *See, e.g., The Seguranca*, 58 F. 908, 909 (S. D. N. Y. 1893); *The Gilbert Knapp*, 37 F. 209, 210 (E. D. Wis. 1889); *Florez v. The Scotia*, 35 F. 916 (S. D. N. Y. 1888).

Contrary to Atlantic's suggestion, then, the occurrence of Edynak's accident on navigable waters [8] mandates the application of federal maritime law—at least once a connection to traditional maritime activity is demonstrated. But, Atlantic protests, to allow the happenstance of locality

7. It has been suggested that *Executive Jet Aviation* establishes that "some definite maritime flavor" is now a prerequisite for all admiralty tort jurisdiction. G. Gilmore & C. Black, The Law of Admiralty § 1-10 at 31 n. 98d (2d ed. 1975). *Accord*, 7A J. Moore, *supra*, ¶ .325[3] at 114 (2d ed. Supp. 1976).

8. Under the locality test, the tort occurs where the alleged negligence takes effect. *Executive Jet Aviation, supra*, 409 U. S. at 266; T. Smith & Son v. Taylor, 276 U. S. 179, 181-82 (1928); The Plymouth, 70 U. S. (3 Wall.) 20, 35 (1866).

to assume such significance is certainly arbitrary.[9] Whatever the merit of that objection, almost one hundred and sixty-five years of admiralty law establish the importance of locality in determining the maritime tort jurisdiction of the federal courts. In 1813, Mr. Justice Story wrote that "[i]n regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." *Thomas v. Lane*, 23 F. Cas. 957, 960 (C. C. D. Me. 1813) (No. 13,902). The view that the gangplank roughly divides the state and maritime regimes [10] has been consistently reaffirmed through the years. *See Victory Carriers, supra*, 404 U. S. at 205 & n. 2 (citing over forty cases); *id.* at 207; *Earles v. Union Line Barge Corp.*, 486 F. 2d 1097, 1100 (3d Cir. 1973). *Executive Jet Aviation* did not overrule that history and repudiate the significance of situs in determining the applicability of federal maritime law. *See* 7A J. Moore, *supra*, ¶ .325[3] at 114 (2d ed. Supp. 1976). At most that case added to the locality rule of maritime tort jurisdiction the requirement that the wrong bear a significant relationship to traditional maritime activity. We hold that the district court properly applied federal maritime law rather than state law to this case.[11]

9. Atlantic points out that had Edynak been injured while standing on the pier, state law would be applied to his case. *Victory Carriers, supra* would appear to support that conclusion.

10. Under the Extension of Admiralty Jurisdiction Act of 1948, 46 U. S. C. § 740 (1970), "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damages or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

11. That Edynak's complaint invoked only the diversity jurisdiction of the district court is, of course, irrelevant to the applicability of federal maritime law. Pleading only diversity jurisdiction is an appropriate manner of preserving the right to a jury trial. *See* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S.

II.

Atlantic next contends that the *Ariana* was not unseaworthy. A brief discussion of the doctrine of seaworthiness must precede an analysis of Atlantic's specific contentions.

The owner of a ship is under an absolute non-delegable duty to furnish a seaworthy vessel. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 549 (1960). The duty extends to seamen or those performing a seaman's duties, *Seas Shipping Co. v. Sieracki, supra; Earles v. Union Barge Line Corp., supra,* 486 F. 2d at 1102, and is not satisfied by the exercise of due care. *Mahnich v. Southern Steamship Corp.*, 321 U. S. 96, 100 (1944). To be seaworthy, the "things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206, 213 (1963). Unseaworthiness, a condition of a vessel which proximately causes injury to the protected class, *Earles, supra,* need not involve a defective condition of a physical part of the ship itself. *Usner v. Luckenbach Overseas Corp.*, 400 U. S. 494, 499 (1971). Rather,

> [a] vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.

11. (Cont'd.)
355, 359-60 (1962); Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 409-11 (1953); 7A J. Moore, *supra* ¶¶ .53[2]-[3], at 389-91; *id.*, ¶ .59[3], at 418.

Id. (footnotes omitted). Unseaworthiness may be either a temporary or a permanent condition. *Mitchell v. Trawler Racer, Inc., supra,* 362 U. S. at 550.

Because liability for unseaworthiness is essentially a species of liability without fault, *Seas Shipping Co. v. Sieracki, supra,* 328 U. S. at 94-95, it is irrelevant how the condition of unseaworthiness came into being. *Earles, supra,* 486 F. 2d at 1102. The unseaworthy condition may have arisen from the conduct of persons other than the ship's own employees. *Alaska Steamship Co. v. Petterson,* 347 U. S. 396 (1954); *see Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U. S. 315, 317 n. 3 (1964); *Carroll v. Frontera Compania Naviera, S.A.,* 390 F. 2d 311, 314 (3d Cir. 1968); Annot., 77 A. L. R. 2d 829 (1961). It makes no difference to the shipowner's liability that he lacked complete control over the instrumentality causing injury, *Earles, supra,* 486 F. 2d at 1102, or that he had neither actual nor constructive notice of the unseaworthy condition. *Mitchell v. Trawler Racer, Inc., supra,* 362 U. S. at 549.

Atlantic raises two arguments regarding the alleged unseaworthiness of the *Ariana*. First, as a threshold matter, Atlantic asserts that Edynak was not among the class to whom the warranty of seaworthiness extends.[12] Second, relying on *Usner v. Luckenbach Overseas Corp., supra,* appellant contends that Edynak's injury was caused not by an unseaworthy condition of the vessel, but rather by the isolated, personal negligent act of a co-employee for which Atlantic cannot be held liable.

12. Atlantic mischaracterizes this argument as jurisdictional. *See Kermarec v. Compagnie Generale Transatlantique,* 358 U. S. 625 (1959).

A.

Atlantic recognizes that had it used its own crew members to unload Allied's cargo, those crew members would have been entitled to the warranty of seaworthiness. The appellant further acknowledges that had it engaged a stevedoring gang to unload Allied's cargo, the longshoremen would, under *Seas Shipping Co. v. Sieracki, supra,* be covered by the warranty because they would be doing the ship's work. But, Atlantic urges, when the employees of the cargo owner unload a vessel, they are doing the work of their employer and not the work of the ship, and consequently lack the protection accorded *Sieracki* seamen.

Atlantic's argument misapprehends the meaning of *Sieracki.* That case held that the obligation of seaworthiness, traditionally owed by a shipowner to seamen, extends to a stevedore injured while working aboard a ship. The Supreme Court's decision indicates the obligation does not depend on the existence of any contractual relationship between the shipowner and the person unloading the vessel, or even between the shipowner and the person's employer. Rather, the responsibility derives from the nature of the work done:

> Historically the work of loading and unloading is the work of the ship's service performed until recent times by members of the crew. . . . That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

Sieracki, 328 U. S. at 96. The Court has several times reiterated that "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness." *Pope & Talbot, Inc. v. Hawn, supra,* 346

U. S. at 412-13. *Accord, Reed v. The Yaka,* 373 U. S. 410, 414-15 (1963); *The Tungus v. Skovgaard,* 358 U. S. 588, 595 n. 9 (1959).

Edynak's employment by Allied, therefore, is irrelevant in determining whether he was entitled to the protection of the seaworthiness warranty. The pertinent inquiry is whether he was doing the ship's work—a question answered by reference to the traditional functions of seamen and not by an examination of his contractual relations. We believe that Edynak's work entitled him to the protection of the warranty. He played an essential part in the unloading of the *Ariana,* and unloading is traditionally the work of the ship's crew. That Edynak's particular function as a signalman was unknown in the days when seamen unloaded vessels does not deprive him of the warranty's protection. The use of modern technology does not nullify the liability of the shipowner. *See Sieracki, supra,* 328 U. S. at 96.

B.

Atlantic asserts that the evidence failed to establish that Edynak's injuries were caused by an unseaworthy condition of the ship. More specifically, the appellant insists that the evidence shows only that Edynak's injuries were caused by the isolated, personal negligent act of a fellow Allied employee, which, under *Usner v. Luckenbach Overseas Corp.,* 400 U. S. 494 (1971), could not render the vessel unseaworthy.

Usner was a longshoreman, employed by an independent stevedoring contractor, who was injured while working with his fellow employees in loading cargo aboard a ship. The circumstances under which he was injured were not disputed. Usner was situated on a barge from which cargo was being loaded onto the ship. His job was to "break

out" bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations proceeded smoothly for some time, until on one occasion the winch operator, one of Usner's fellow employees, did not lower the fall far enough. Usner motioned to the flagman on the ship's deck to direct the winch operator to lower the fall farther. The winch operator then lowered the fall, but too far and too fast. The sling struck Usner, causing his injuries.

Usner brought an action for damages in federal district court against the owner and charterer of the vessel, alleging that the ship's unseaworthiness had caused his injuries. The district court denied the defendants' motion for summary judgment, but granted leave to take an interlocutory appeal. The United States Court of Appeals for the Fifth Circuit permitted the appeal and reversed, holding that "instant unseaworthiness" caused by the "operational negligence" of the stevedoring contractor was not a basis for recovery. *Usner v. Luckenbach Overseas Corp.*, 413 F. 2d 984, 985-86 (5th Cir. 1969).

The Supreme Court affirmed. Mr. Justice Stewart's opinion for the majority emphasized that unseaworthiness is a *condition*, not an act. Because Usner's injuries were caused not by a condition of the ship, her appurtenances, her cargo, or her crew, but by the "isolated, personal negligent *act*" of Usner's fellow longshoreman, the shipowner could not be held liable for unseaworthiness. 400 U. S. at 500 (emphasis added).

Although the difference *Usner* draws between an act and a condition is difficult to apply in practice, *see* 400 U. S. at 504 (Harlan, J., dissenting), we can make two explanatory observations. First, the distinction is in part temporal: an act occurs instantaneously, whereas there

must be some period of time during which a condition exists. *Ryan v. Pacific Coast Shipping Co.*, 509 F. 2d 1054, 1057 n. 6 (9th Cir. 1975). Second, a condition necessarily consists of more than one act. *Id.; Caparro v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 503 F. 2d 1053, 1054 (2d Cir. 1974) (per curiam).

Usner did not hold that the negligence of a longshoreman can never cause a vessel to be unseaworthy. If a longshoreman's negligence amounts to more than an isolated act and creates a condition of the vessel, then, even after *Usner*, the negligence can render the vessel unseaworthy. *See generally Earles v. Union Barge Line Corp., supra*, 486 F. 2d 1097, 1103 n. 31, 1107 n. 61; *Ward v. Union Barge Line Corp.*, 443 F. 2d 565, 571 (3d Cir. 1971). Judge Goldberg, writing for a panel of the Fifth Circuit, has provided the clearest explication of the post-*Usner* relationship between a longshoreman's negligence and a vessel's unseaworthiness:

> A longshoreman or one of his fellows might engage in a *congeries* of negligent acts that are of such a character or that continue for such a length of time that they become related to the status of the vessel. That *congeries* of acts might create a "condition" of unseaworthiness, so that an individual act of negligence within or after the *congeries* might give rise to liability under the unseaworthiness doctrine. However, if the negligent act of a longshoreman is not part of any *congeries* of negligent acts connected to the status of the vessel or to its loading but is rather an isolated "instantaneous" act of negligence within an otherwise seaworthy method of loading on an otherwise seaworthy vessel, then that one act of negligence by the longshoreman or his fellows will not render the vessel unseaworthy.

Robinson v. Showa Kaiun K. K., 451 F. 2d 688, 690 (5th Cir. 1971). *Accord, Parker v. S/S Dorothe Olendorff*, 483 F. 2d 375, 381 n. 4 (5th Cir. 1973), *cert. denied*, 416 U. S. 905 (1974).

In the instant case, the *Usner* issue was fully litigated at trial. Edynak attempted to prove that the crane operator employed an improper method of unloading the *Ariana*, rendering the vessel unseaworthy [13] and proximately causing his injuries. Atlantic countered by attempting to show that Edynak's injuries were caused by the isolated, personal negligent act of the crane operator, who, prior to this accident, had not previously lowered the crane bucket without a signal from Edynak.

We believe that the evidence permitted the jury to find that the *Ariana* was unseaworthy. There was testimony that the crane operator repeatedly lowered the crane bucket before steadying the draft, causing the bucket to swing. One witness, a stevedore superintendent, testified that lowering the bucket before it was steadied would constitute an improper method of unloading. The signalman who had been directing the crane at the *Ariana's* number two hatch on the day of the accident averred that the crane operator at Edynak's hatch, number three, struck the coaming with the bucket five or six times. Another witness stated that the movements of the crane at the number three hatch were jerky, and that the crane operator was using the "free-fall" method of lowering the bucket. This method, it

13. The Supreme Court has indicated that an improper method of unloading can render a vessel unseaworthy. Usner v. Luckenbach Overseas Corp., *supra*, 400 U. S. at 499; Morales v. City of Galveston, 370 U. S. 165, 170-71 (1962); *see* Ferrante v. Swedish American Lines, 331 F. 2d 571, 578 (3d Cir.), *petition for cert. dismissed*, 379 U. S. 801 (1964). Because the focus of the plaintiff's case was on the method of unloading, and not on the fitness of the crane, it is irrelevant that the crane was shore-based. *See* Burns v. Anchor-Wate Co., 469 F. 2d 730, 733 (5th Cir. 1972).

was explained, consists of allowing the bucket to fall of its own weight, using a brake to slow or stop its movement. A ship's officer, called by Edynak as an expert witness, testified that the free-fall method was improper under the circumstances because it did not give the crane operator sufficient control over the crane bucket. The proper method under the circumstances, the witness said, would have been to lower the bucket under power, in gear.

On the basis of this evidence the jury could conclude that Edynak's injuries resulted from an improper method of unloading rather than from the crane operator's isolated act of negligence in lowering the bucket without a signal. The jury could find that the free-fall method, particularly as practiced by this crane operator, was improper because of the risk that the operator might inadvertently release the brake and drop the bucket.[14] And the evidence could be viewed to indicate that the operator used this method on many lowerings over a considerable period of time, creating a condition of unseaworthiness.

The jury was thoroughly and accurately instructed on the *Usner* issue, and we find no reversible error in the other

14. Atlantic contends that the bucket of this crane could be lowered *only* by the free-fall method. That being so, appellant maintains, the gravamen of Edynak's complaint must be that the crane itself was defective rather than that the method of unloading was improper. But the defectiveness of the crane, it is urged, could not render the *Ariana* unseaworthy, because the crane was neither appurtenant to the ship nor a part of the ship's equipment; furthermore, there was no evidence that a crane that can be lowered only by free-fall is defective.

We disagree with Atlantic's premise. Although the only witness who had viewed the crane—a witness called by Atlantic—testified that its bucket could not be powered down, other witnesses familiar with this general type of crane testified that it could indeed be powered down. The matter was a credibility issue for the jury's determination. We note also that the trial judge's charge informed the jury that the theory of Edynak's case was the impropriety of the unloading method; he specifically instructed the jury that Edynak had adduced no evidence to establish that the crane itself was defective.

aspects of the unseaworthiness charge.[13] The cases counsel that an unseaworthiness verdict returned by a properly charged jury ordinarily should not be disturbed. *See e.g., Mahnich v. Southern Steamship Co., supra,* 321 U. S. 96; *Earles v. Union Barge Line Corp., supra,* 486 F. 2d at 1104. Heeding that advice, we affirm on the issue of liability.

III.

Atlantic argues that the jury's award of $300,000 to compensate Edynak for his injuries was clearly excessive, and that the trial judge should therefore have granted Atlantic's motion for a new trial. We undertake our examination of this contention with the knowledge that our standard of review is severely limited. The question of the excessiveness of a verdict is primarily a matter to be addressed to the sound discretion of the district judge, and we may not disturb his determination unless a "manifest abuse of discretion" be shown. *Wooley v. Great Atlantic & Pacific Tea Co.*, 281 F. 2d 78, 80 (3d Cir. 1960); *see Moore v. Swenfurth*, 368 F. 2d 317 (3d Cir. 1966). Stated another way, we may reverse the determination of the district judge and grant a new trial only if the verdict is "so grossly excessive as to shock the judicial conscience." *Russell v.*

15. The trial judge charged the jury that "so long as you find that the crane was being utilized at the time of the accident in the unloading operation of the ship . . . for such purposes the crane and the bucket would be considered in the eyes of the law as an appliance or appurtenance or tool or piece of equipment of the ship." This instruction would appear to be inaccurate in light of *Victory Carriers, supra;* by the trial judge's reasoning, the forklift in *Victory Carriers* would have been part of the ship's equipment. *See Burns v. Anchor-Wate, supra,* 469 F. 2d at 733. We deem any error in this regard as harmless, however, because the focus of Edynak's case was on the method of unloading, and not on the fitness of the crane. *See* note 13 *supra.* In fact, the trial judge specifically instructed the jury that there was no evidence from which they could conclude that the crane was defective. *See* note 14 *supra.*

Mononghahela Railway Co., 262 F. 2d 349, 352 (3d Cir. 1958). It is simply not our function to assess what would constitute fair recompense for the injuries sustained by the plaintiff: our duty is instead to ascertain whether the trial judge, weighing all the evidence on damages, "has exercised his considered judgment as to a rational verdict in a judicial manner." *Id. See generally Taylor v. Washington Terminal Co.*, 409 F. 2d 145, 148 (D. C. Cir.), *cert. denied,* 396 U. S. 835 (1969); Note, *Remittitur Practice in the Federal Courts,* 76 Colum. L. Rev. 229, 303-04 (1976). With these guidelines in mind, we turn to the evidence adduced in support of the damage award.

The parties stipulated that Edynak's medical expense totaled $12,746.90, and there was no evidence that he would incur additional medical expenses in the future. His wage loss was calculated to be $13,669.19. We can deduce, therefore, that the jury awarded approximately $273,500 for loss of earning capacity and for pain and suffering.

There was little evidence to establish any significant loss of earning capacity. At the time of his accident in 1971, Edynak was classified as a laborer. He had joined Allied as a laborer in 1964, although he had spent some time working as a guard, process man, and material handler between the time of his hiring and the time of his accident. At the time of trial, Edynak was still classified as a laborer; he now performs a variety of chores as a groundskeeper, tank watcher, and janitor. In the three years prior to his accident, Edynak earned a maximum of $7800 per year at Allied. In 1973, he made slightly over $8500, and in 1974, approximately $8330. Edynak testified that because he is no longer allowed on ships, he is not eligible for as much overtime as other employees. He conceded that on cross-examination, however, that overtime work is voluntary, and that he has not requested any.

Allied's superintendent of employee relations averred that while Edynak's present job is reasonably secure, his prospects for promotion have been limited by his disability.

The evidence regarding pain and suffering was more substantial. A surgeon testified that when he first saw Edynak on the day of the accident, the skin on the back of his hand was completely torn away and the second, third, and fourth metacarpal bones—the bones on the top of the hand connecting the wrist to the fingers—were fractured. At that time, the surgeon stated, Edynak was "severely traumatized from a psychological point of view." Replacing the lost skin involved a grafting process whereby Edynak's hand was sewn to his abdomen. His hand remained in that position for thirty-four days. Nine surgical procedures, performed over the course of more than three years, were necessary to reconstruct the hand. Restoration of the hand to normal use, however, was impossible; the surgeon estimated that Edynak had suffered a permanent, seventy-five percent loss of the use of his hand. Edynak can use his left hand to open a car door, pinch and grasp, turn a doorknob, and drive, but he is unable to do anything requiring good coordination of the fingers. He testified that he experiences a continuous throbbing pain, and one of his physicians stated that he could do nothing specific to relieve the discomfort. Finally, there was evidence that the hand is and will remain disfigured.

Although the award was quite high, it was not "contrary to all reason." *Taylor v. Washington Terminal Co.*, *supra*, 409 F. 2d at 148. The deference we owe the trial judge, "who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record," and the respect due "the jury's determination of such matters of

fact as the weight of the evidence and the quantum of damages," combine here to overcome whatever misgivings we might have regarding the size of the verdict. *Id.*[16] Had we been the district judge, we might perhaps have found the verdict excessive and granted Atlantic's motion for a new trial. But we cannot say that the award shocks the judicial conscience, and therefore cannot hold that the district court's denial of the motion constituted a manifest abuse of discretion.

IV.

We have carefully examined the other contentions raised by the appellant, and we find them to be without merit.

Accordingly, the judgment of the district court will be affirmed.

16. Evidence of pain and suffering is particularly ill-suited to review upon only a written record.

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-2686

STEPHEN EDYNAK

v.

ATLANTIC SHIPPING, INC.

v.

ALLIED CHEMICAL COMPANY

Memorandum Opinion

VANARTSDALEN, *J.* August 10, 1976

Plaintiff's left hand was crushed by a crane bucket while plaintiff was aboard defendant's ship working as a crane signalman in unloading operations. The crane was land based, and plaintiff and the crane operator were both employed by Allied Chemical Company whose cargo was being unloaded. A jury awarded plaintiff $300,000 in damages, reduced to $285,000 by reason of a jury finding of 5% contributory negligence. The judgment was against the shipowner. In answers to interrogatories, the jury found liability based on negligence and unseaworthiness.

The action was not controlled by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 901-905(b).

Defendant's motion for judgment n.o.v. and, alternatively, for a new trial, will be denied. The briefs of counsel for plaintiff and defendant adequately set forth the essential facts which need not be repeated.

Defendant first contends that the doctrine of unseaworthiness can have no application because the crane was land based and not owned by defendant. Plaintiff was injured aboard the ship. Plaintiff presented evidence at trial that the method of operating the crane was improper, and consequently rendered the ship unseaworthy. It is my understanding of the law prior to the 1972 amendments to the Act, that the shipowner had a non-delegable duty to maintain a seaworthy ship, which extended to workmen aboard ship performing longshoremen services in loading and unloading cargo.

Witnesses testified to an improper method of operating the crane over a two day period. This evidence, if accepted by the jury, takes the case out of the doctrine of an "isolated, personal negligent act of the petitioner's fellow longshoreman" enunciated in *Unser v. Luckenbach Overseas Corp.*, 400 U. S. 494, 500 (1971). The jury was charged:

> However, if you should find that the plaintiff's injuries were caused solely by a single, isolated, unforeseen and negligent act of a fellow workman of Allied Chemical Company, then plaintiff would not be entitled to recover because such would not make the ship unseaworthy. (N. T. 4-65).

Defendant objects to the use of the word "single." Although that exact word was not used in Unser, the words

"isolated, personal negligent act," stated in the singular, necessarily imply a single act.

I find no case that denies the applicability of maritime law or the doctrine of "seaworthiness" to a shipboard accident, solely because the equipment causing the accident is land-based and not owned by the shipowner. Where, as here, the contention is an improper method of operation, as opposed to defective equipment, the location and ownership of the crane would not provide a basis for lowering the shipowner's duty to protect those aboard ship by stopping the improper operation.

The crane operator was Mr. Clark. Defense attempted to establish that he was a careful, experienced crane operator. Mr. Clark died prior to the trial, and no deposition had ever been taken from him. Defendant called one of Mr. Clark's superiors, Mr. Florio, and questioned him extensively about Mr. Clark's experience and ability, including whether there had ever been any complaints against Mr. Clark by fellow employees (N. T. 3-17). In addition, Mr. Florio testified as to methods of lowering the crane by braking. In cross-examination he stated, "In any air braking system it's very difficult . . . to get that set perfectly." (N. T. 3-28). He was then asked:

> Q. As a matter of fact, not long before this accident Mr. Clark dropped a load on a cab of a truck, didn't he?

There followed an explanation by Mr. Florio of that prior accident. This testimony would appear to be proper cross-examination.

Defendant sought to introduce into evidence a statement written by Mr. Clark after the accident and given to a representative of Mr. Clark's employer. The statement was a self-serving, ex parte exculpatory explanation of the accident. Plaintiff's counsel never had an opportunity to

question Mr. Clark about it. The statement was not under oath. The Federal Rules of Evidence should be liberally construed, but even under the "catch-all" hearsay exception of Rule 804(5), by which defendant sought admission of the statement, there must be "circumstantial guarantees of trustworthiness," equivalent to those of the specific exceptions of 804(1) through 804(4) inclusive. There were no such guarantees. To let such a statement in would permit the out-of-court statement of any eyewitness who was "unavailable" within the definition of Rule 804.

An instruction was given to the jury that if they should find that a material witness was particularly within the ability of the one side to call, as opposed to the other, and such witness was not called, the jury could conclude that such witness's testimony would not have been favorable to such party. The instruction was not, as requested by plaintiff, that the jury could conclude that the testimony would be adverse or unfavorable. This instruction was given in part because of closing arguments by counsel concerning the non-calling of witnesses. Defense counsel argued that the uncalled ship's crew members could have added nothing to the case, *i.e.*, their evidence would not have been favorable to defendant. *See* N. T. 4-38. The instruction given, contrary to defendant's post-trial contentions, did not encourage the jury to speculate, but conversely was to advise them not to guess that ship personnel, if called, would have assisted defendant's case. The instruction was consistent with defendant's argument to the jury.

When instructing the jury on contributory negligence, it was clearly proper to caution them not to infer in any way that the trial judge was expressing an opinion that the jury should or should not find contributory negligence. In any event, the defendant was not prejudiced, because the jury did find plaintiff contributorily negligent. Defend-

ant's objection is that the amount of contributory negligence was only 5%. This was for the jury's evaluation. No suggestion as to any particular percentage amount was made by the court. When a case is not bifurcated as to damages, I customarily give a similar instruction prior to instructions on damages. At the outset of the charge, the jury was instructed that they should not try to interpret any instruction as a suggestion of a proper jury determination of any factual issue.

Defendant was not "surprised" by plaintiff's theory of liability as to an improper method of operation. The pretrial memorandum asserted improper and unsafe method of operation of the crane. Answers to expert interrogatories likewise set forth plaintiff's theories of liability.

Defendant contends the damages are excessive. This is a matter for the jury's assessment. The evidence is clear that there was a substantial permanent impairment in the functional use of the left hand, after a series of difficult and painful reconstructive medical procedures. Although the jury's award may have been generous, I do not find it excessive, or in justice requiring a remittitur.

Defendant's contention that the jury was swayed by possible loss of income because of the sale of a liquor license owned by a corporation in which plaintiff and his wife were the shareholders lacks merit. The jury was expressly instructed that it could not consider any loss in the sale of the bar. (N. T. 6-74). There is no reason to believe this instruction was ignored. Evidence as to the bar ownership and sale were received without objection. (N. T. 5-5, 5-9). Only when the sale price was asked and answered did defendant object (N. T. 5-22), without moving to strike. Plaintiff explained his purpose at sidebar conference. (N. T. 5-22, 5-24). The instructions to the jury corrected any possible misuse of this testimony.

I do not consider plaintiff's closing remarks to be improper, or to suggest to the jury that the award for pain and suffering should be ten times the actual medical bills. (N. T. 6-49, 6-50). Any possible impropriety in the argument was corrected in the charge (N. T. 6-66, 6-67) to the effect that pain and suffering is not necessarily the most important item, and plaintiff's argument was only an expression of opinion of counsel that should not be considered by the jury. The jury was further instructed not to consider the argument that because they can see the medical expenses, "there are much larger items from pain and suffering below the surface." The jury was carefully instructed as to the proper measure of damages for pain and suffering.

The jury was instructed that plaintiff had the burden of proof to establish his damages by a preponderance of the evidence, and that all instructions given on the liability aspects of the case as to the definition of "preponderance of the evidence" should be recalled. (N. T. 6-64). The specific elements that should be considered in setting damages were defined in detail. The jury was not given a free reign to award for future damages that might possibly occur. In this respect the charge stated:

> . . . nobody can foretell the future with any degree of absolute certainty, but you are required insofar as you can properly do so under the evidence to look to the future and to determine what damages the plaintiff will suffer in the future and to compensate him for these damages. (N. T. 6-69).

The jury was specifically told not to include any future medical expenses as there was no evidence that there would be future medical expenses. Even though by seeing plain-

tiff's hand, a reasonable person might anticipate some future reconstructive procedure highly probable, this possibility was ruled out of the case. The jury was told that as to future pain and suffering, compensation should be allowed "to the extent you find there will be pain and suffering in the future." (N. T. 6-69). Considering the detailed instructions and that damages must be established by a preponderance of the evidence, it would have been redundant to tell the jury that awards for future damages must be found to be reasonably certain to occur.

Defendant contends that the trial judge should expressly have told the jury that it could not consider the effect inflation may have on earning power, in answer to a jury question during deliberations. The question asked was: "Should we take into consideration the adjustment for inflation that Allied provides, say the yearly salary?" (N. T. 6-101). There was evidence that over a period of years, Allied, plaintiff's employer, had made annual salary increases for employees, based on existing union contracts. (Testimony of Severin Sumers, Jr., N. T. 6-20, 6-34). To the extent this evidence established that there would be future wage increases, the jury could properly take this into consideration. This is entirely different from allowing a jury to guess as to future wage increases based on a general economic inflationary trend. The juror's question specifically confined itself to the adjustments made by Allied, as to which there was substantial evidence. No further instructions were necessary, and probably would have caused confusion. Consequently the jury was simply told to base its decision on the evidence presented.

The jury was also expressly advised that it could not consider income taxes in setting its award.

> You are not to take into consideration in any way the effect that there may be by reason of any federal income taxes, that is to say you are neither to add to nor to subtract from your verdict or the amount awarded by reason of any beliefs that you may have or any calculations that you may have as to federal income taxes. (N. T. 6-78, 6-79).

This instruction is in substantial accord with the rule of *Domeracki v. Humble Oil and Refining Co.*, 443 F. 2d 1245, 1251 (3d Cir. 1971). The only difference is that I did not tell the jury that an award would not be subject to federal income taxes. It seems to me that when a jury is expressly told not to consider a certain possible factor, such as income taxes, the jury need not be advised of the reason for the instruction, namely, that taxes are not payable on the award. Otherwise, one would have to conclude that the jury deliberately violated a very explicit instruction because the rationale for it was not given to them.

I have reviewed the entire record. I believe the parties fairly presented the case to the jury, that the jury properly understood its functions and conscientiously followed the instructions as to the law, and awarded a fair, if liberal, award of damages. The verdict should stand.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2293

STEPHEN EDYNAK

v.

ATLANTIC SHIPPING INC.
CIE. CHAMBON MACLOVIA S.A.

v.

ALLIED CHEMICAL COMPANY

Atlantic Shipping, Inc.,
Appellant

(D. C. CIVIL ACTION No. 73-2686)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge*, ROSENN, *Circuit Judge* and MEANOR, *District Judge*[*]

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 3, 1977.

[*] H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 12, 1976, be, and the same is hereby affirmed. Costs are taxed against appellant.

ATTEST:

THOMAS F. QUINN
CLERK

August 15, 1977

APPENDIX D.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 76-2293

—

STEPHEN EDYNAK

v.

ATLANTIC SHIPPING INC.
CIE. CHAMBON MACLOVIA S.A.,
Appellant

v.

ALLIED CHEMICAL COMPANY

—

Sur Petition for Rehearing.

—

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, *Circuit Judges,* and MEANOR, *District Judge*°

—

The petition for rehearing filed by Atlantic Shipping Inc., Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

MAX ROSENN
Judge

Dated: September 23, 1977

° H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX E.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 76-2293

—

STEPHEN EDYNAK

v.

ATLANTIC SHIPPING INC.
CIE. CHAMBON MACLOVIA S.A.

v.

ALLIED CHEMICAL COMPANY
Atlantic Shipping, Inc.,

Appellant

—

(D. C. Civil No. 73-2686)

—

Present: SEITZ, *Chief Judge* and ROSENN, *Circuit Judge* and MEANOR, *District Judge*[*]

—

Appellant's Motion for Recall and Stay of the Mandate in the above-entitled case is granted until November 20, 1977 upon condition that the Appellant shall during

[*] H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

the period of said stay file a petition for writ of certiorari with the Supreme Court of the United States and that appellant shall resubmit to the District Court for its approval and shall file on or before October 25, 1977 a good and sufficient supersedeas bond with the Clerk of the United States District Court for the Eastern District of Pennsylvania in the sum of $350,000.00.

By THE COURT,

MAX ROSENN
Circuit Judge

Dated: October 20, 1977

APPENDIX F.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Civil Action No. 73-2686

—

STEPHEN EDYNAK

Plaintiff

v.

ATLANTIC SHIPPING, INC.
CIE. CHAMBON MACLOVIA S.A.

Defendant

—

Order.

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And now this 21st day of October, 1977, it is hereby ordered that the order of October 12, 1977, denying approval of the Supersedeas Bond filed October 11, 1977, is vacated, and

It is further ordered and decreed that, in light of the October 20, 1977, order of the United States Court of Appeals for the Third Circuit granting Appellant's Motion for Recall and Stay of Mandate, the aforesaid Supersedeas Bond is hereby APPROVED.

By THE COURT:

/s/ DONALD W. VANARTSDALEN
VanArtsdalen, *J.*